Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Provision of Directory Listing Information	)	
Under the Telecommunications Act of 1934,	)	CC Docket No. 99-273
As Amended	)	
	)	
TO: The Commission	)	

REPLY COMMENTS OF INFONXX, INC.

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SUMMARY

The comments filed in this proceeding establish a record for the Commission to adopt rules to ensure nondiscriminatory access to directory listing information at competitive rates. The weight of the comments conclude that the Commission has authority to ensure that independent directory assistance (DA) providers gain timely access to accurate directory listing information at prices comparable to those paid by other DA providers. Three salient points come out of the comments.

First, in order for CLECs to compete effectively in the local exchange market, independent DA providers must be able to offer competitive wholesale DA service to them. The unwillingness of the ILECs to fairly share the directory information they control has hampered entry and growth in the DA services market.

Second, a majority of the commenters, including the incumbent carriers endorse (or at least accept) that when DA providers act as agents of carriers, they are entitled to nondiscriminatory access to directory listing information pursuant to Section 251(b)(3), and no reason exists for the agent's right to use the information to be narrower than the carrier principal's right. Additionally, DA providers offering "call completion" should qualify as telephone exchange and telephone toll service providers entitled to access under Section 251(b)(3). Sections 201(b) and 202(a) provide another basis to grant nondiscriminatory access to directory listing information in accordance with the terms of Section 251(b)(3), as the Commission found in applying Section 251(b)(3) to paging carriers in the *Local Competition Second Report and Order*.

Third, the commenters supporting competition in the DA arena agree that regardless of the statutory basis by which an independent DA provider obtains access to

directory listing information, that access must be at the same forward-looking, incremental cost-based prices paid by interexchange carriers and others that obtain access to databases under Section 251(c)(3).

With this record, the Commission now can step forward and enhance competition in the directory assistance *and* local exchange markets by promptly adopting rules requiring access at nondiscriminatory rates.

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INFONXX, Inc. (INFONXX), by its attorneys, hereby submits these reply comments in the above-referenced proceeding to affirm the several commenters urging the Commission to establish rules that will afford competitive directory assistance (DA) providers access, at reasonable and nondiscriminatory prices, to the directory listing information currently controlled by incumbent local exchange carriers (ILECs).

The comments filed in this proceeding recognize and reflect the important role that independent directory assistance providers have played and should continue to play in bringing competition to communications markets traditionally dominated by the local exchange monopoly. However, the comments also reveal a competitive landscape that disadvantages independent DA providers by allowing ILECs to maintain control over the directory listing information that is essential to providing accurate and competitive directory assistance services. As the comments of Time Warner Telecom, a competitive local exchange carrier (CLEC) that purchases DA services, state: "Regulatory intervention is necessary to eliminate this barrier to competition."[1] Absent such regulatory intervention, independent DA providers ultimately may not survive as a competitive force in the market. If that were to occur, smaller CLECs, such as Time Warner, will be put at a competitive disadvantage to the major CLECs, such as AT&T and MCI WorldCom (MCIW), because they will be forced to enter the DA market – or to pay very high retail rates – in order to provide directory assistance, which is an essential adjunct to basic telecommunications service. This would invalidate the assumptions underlying the Commission's recent *UNE Decision* to exclude DA services from the list of unbundled network elements (UNEs) and, as demonstrated in the comments filed herein, would undermine the ability of CLECs to offer their customers DA service of a quality and at a price comparable to the ILECs.

The comments further support INFONXX's assertion in its opening comments that the Commission has ample authority to adopt the necessary rules to facilitate the development of competition in the directory assistance market, and the comments highlight the procompetitive, public interest benefits that would flow from the Commission's exercise of that authority. Accordingly, INFONXX urges the Commission to adopt the necessary rules to ensure that competitive DA providers have timely access to accurate directory listing information at prices comparable to those paid by other providers of DA services.

[1] Comments of Time Warner Telecom, at 5 (*TWTC Comments*).

I. INDEPENDENT DIRECTORY ASSISTANCE PROVIDERS ARE ESSENTIAL TO THE DEVELOPMENT OF COMPETITION IN THE MARKETS FOR DIRECTORY ASSISTANCE AND LOCAL EXCHANGE SERVICES.

In taking the very first steps to implement the 1996 Act, the Commission recognized that CLECs need access to wholesale DA service.[2] The hard experience of CLECs over the past three years underscores the wisdom of the Commission's decision. The comments of Time Warner Telecom, a provider of competitive local exchange service, demonstrate how important the availability of a competitive market for wholesale DA service is to a CLEC's ability to compete effectively in the local exchange market. Time Warner explains that smaller CLECs, unlike large interexchange carriers, have insufficient call volume to self-provision DA service efficiently and accordingly must turn to outside providers.[3] However, Time Warner has found that when independent DA providers are denied access to ILECs' directory listing information or are charged exorbitant prices for such access, the service that the independent providers can offer generally has not been of sufficient quality or at a low enough price to be competitive with the DA service provided by the ILECs.[4]

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[2] *See* Second Report and Order and Memorandum Opinion and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 19392, 19445 (1996) (*Local Competition Second Report and Order*) ("We recognize that resale of operator services and directory assistance is a primary vehicle through which competing providers, especially new entrants and small business entities, can make operator services or directory assistance available to their customers . . . .").

[3] *TWTC Comments*, at 1-2. The ILECs' comments recognize that CLECs often turn to third-party providers for directory assistance services. As part of this recognition, several of the ILEC comments accept the validity of the agency relationship that develops between a carrier principal and its DA agent and acknowledge that the agent DA provider is entitled to obtain directory listing information from LECs via its carrier principal. *See* Comments of Cincinnati Bell Telephone Co., at 11 (*CBT Comments*); Comments of MCI WorldCom, at 4-5 (*MCIW Comments*); Comments of U S WEST Communications, Inc., at 5 (*U S WEST Comments*).

[4] *TWTC Comments*, at 2-3.

Until recently, this has meant that CLECs such as Time Warner felt constrained in their choice of DA provider, but they still could obtain DA service at reasonable rates as a UNE under Section 251(c)(3). Under the Commission's *UNE Decision*, however, CLECs no longer have the option of obtaining DA service as a UNE, and ILECs are not required to offer DA service to CLECs at UNE prices.[5] Where there is no regulatory requirement governing the price at which ILECs offer DA service, it is the market that must provide the competitive pressure to keep prices reasonable. However, as noted in the comments of Time Warner and a number of independent DA providers, market distortions have prevented the market for DA service from becoming truly competitive.[6] ILECs, by virtue of their dominant position in the local exchange market, control the only fully accurate database of directory listing information, and they have not been required – or willing – to share that information on nondiscriminatory terms with all of their DA competitors.

As Commissioner Ness noted in her separate statement on the *UNE Decision*, independent DA providers are "clearly hamper[ed in] their ability to provide reliable directory assistance to those carriers that will now [as a result of the *UNE Decision*] need to rely on a non-incumbent source for their OS/DA."[7] Given these circumstances, CLECs increasingly will find it difficult to obtain accurate DA service at reasonable prices, which will interfere with their

[5] "FCC Promotes Local Telecommunications Competition," News Release, Report No. CC 99-41, at 2 (Sept. 15, 1999).

[6] *See TWTC Comments*, at 2-3; *see also* Comments of Excell Agent Services, L.L.C., at 2-3 (*Excell Comments*); Comments of Listing Services Solutions, Inc., at 2 (*LSSi Comments*); Comments of Metro One Telecommunications, Inc., at 2-3 (*Metro One Comments*).

[7] Separate Statement of Commissioner Ness, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98*, at 2-3 (Sept. 15, 1999).

ability to offer competitive local exchange services. Against this competitive landscape, it is clear that the Commission must step in to mitigate the market distortion created by the ILECs' historical monopoly control of directory listing information.

The comments of both the ILECs and the large carrier DA competitors that obtain DA information under Section 251 also provide evidence of the competitive potential offered by independent DA providers. Their comments argue vehemently – if not always coherently – against allowing independent DA providers access to the tools that will enable them fully to compete.[8] Even MCIW, which purports to be interested in "advancing the Commission's goal of promoting competition in the directory assistance and directory publishing markets,"[9] in fact seeks to slow or prevent the entry of new competitive players in the DA market by urging the Commission to deny independent DA providers access to DA information under Section 251.[10] MCIW's restrictive interpretation of the Act would reduce the number of potential competitors in the market, producing results clearly inconsistent with the procompetitive goals it purports to advance.

II. THE COMMISSION HAS SUFFICIENT AUTHORITY TO ENSURE THAT INDEPENDENT DA PROVIDERS HAVE ACCESS TO THE INFORMATION THEY NEED TO PROVIDE A COMPETITIVELY VIABLE SERVICE.

The statutory landscape against which this proceeding's competitive issues are raised provides a number of complementary bases on which the Commission may determine that competitive directory assistance providers are entitled to access to directory listing information at

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[8] *See, e.g.*, Comments of Bell Atlantic, at 5 (*Bell Atlantic Comments*); *CBT Comments*, at 11-13; Comments of GTE, at 9-10 (*GTE Comments*); *MCIW Comments*, at 3-5; Comments of United States Telephone Association, at 6-7 (*USTA Comments*).

[9] *MCIW Comments*, at i.

nondiscriminatory rates, terms, and conditions. The Commission should rule on all bases that independent DA providers can obtain access to directory listing information because of the distinct competitive features of the providers.

A. Competitive Directory Assistance Providers Are Entitled To Access To Directory Listing Information When They Serve As The Agents Of Carriers Entitled To Access Under Section 251(b)(3).

A majority of the commenters, including the ILEC commenters, endorsed (or at least accepted) the agency theory set forth in the *Notice,* whereby non-carrier competitive DA providers are entitled to nondiscriminatory access to directory listing information pursuant to Section 251(b)(3) as the agents of carriers covered under that section.[11] Thus, as INFONXX explained in its initial comments, the Commission is on solid ground in granting carrier agents rights under Section 251(b)(3).

Some commenters, however, would impose cumbersome, "form-over-substance" requirements that the carrier itself must obtain the information first and pass it along to the DA agent.[12] Some commenters also argue that DA providers who obtain access to DA information as the agents of carriers should be restricted in the use of the information they obtain to delivering DA to the carrier's customers.[13] However, the commenters offer no support for these proposed limitations on the use of information obtained by DA agents. Nothing in Section

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(continued . . .)
[10] *Id.* at 4 (arguing against agency theory).

[11] *See, e.g.*, *CBT Comments*, at 11; *Excell Comments*, at 7-9; *LSSi Comments*, at 20-21; *MCIW Comments*, at 4; *Metro One Comments*, at 17-18; Comments of Teltrust, Inc., at 3-8 (*Teltrust Comments*); *TWTC Comments*, at 6-7; *U S WEST Comments*, at 5.

[12] *See CBT Comments*, at 11; *MCIW Comments*, at 4.

[13] *Bell Atlantic Comments*, at 5; *CBT Comments*, at 11.

251(b)(3) limits how or to whom a carrier that obtains DA information may use or distribute that information. And there is no reason, and no justification, as to why the rights of the agent should be narrower and inferior to those of the carrier principal. Moreover, as INFONXX explained in detail in its opening comments, the administrative burdens and inefficiencies that would result from requiring independent DA providers to segregate the information they receive as agents would be so severe that they would virtually cancel out any benefits derived from obtaining the information.[14]

In addition, a strict limit on the use of subscriber information by a competing DA provider ignores the situation where a DA provider serves more than one carrier in an area. There is no reason why a DA provider, as an agent of a carrier, should have to pay multiple times for the same information. However, INFONXX is not suggesting that no restrictions should apply. We agree that competing DA providers should be subject to the same limitations on the use of subscriber information, such as those adopted in the *CPNI* proceeding, as are imposed on other providers.[15]

Accordingly, the Commission should reject any suggestion that an agent's use of DA information obtained under Section 251(b)(3) should be restricted to specific purposes or customers.

[14] Comments of INFONXX, Inc., at 19 (*INFONXX Comments*).

[15] *See Local Competition Second Report and Order*, 11 FCC Rcd at 19458 ("[I]n permitting access to directory assistance, LECs bear the burden of ensuring that access is permitted only to the same information that is available to their own directory assistance customers, and that the inadvertent release of unlisted names and numbers does not occur."). INFONXX understands and accepts these limitations.

B. Competitive Directory Assistance Providers Are Entitled To Access Directory Listing Information When They Offer Call Completion Service.

INFONXX's opening comments also demonstrated at least one scenario through which a DA provider could provide call completion service that would make it a provider of telephone exchange and telephone toll service entitled to the protections of Section 251(b)(3). Ultimately, only a few commenters challenged the idea that the provision of call completion service could involve the provision of telephone exchange and telephone toll service.[16] Cincinnati Bell Telephone, in particular, argues that a DA call completion provider cannot be a telephone exchange and telephone toll service provider because "[t]he non-carrier directory assistance provider does not actually transmit a call over the network. Instead, the directory assistance provider merely directs the call to either a local exchange or toll provider that will actually carry traffic from the caller to the call recipient."[17] This comment misses the point that a provider of service does not need end-to-end control of all transmissions in order to qualify as a carrier. In addition, if the Commission declares such DA providers entitled to interconnection and UNEs under Section 251, a DA provider will be able to purchase at wholesale the necessary unbundled loops and other network elements it needs to transmit calls itself. In those circumstances, it should be beyond argument that the DA provider is a telephone exchange and telephone toll service provider.

The following diagram provides a simple example of how a DA provider can become a telephone exchange and telephone toll service provider upon obtaining the right to

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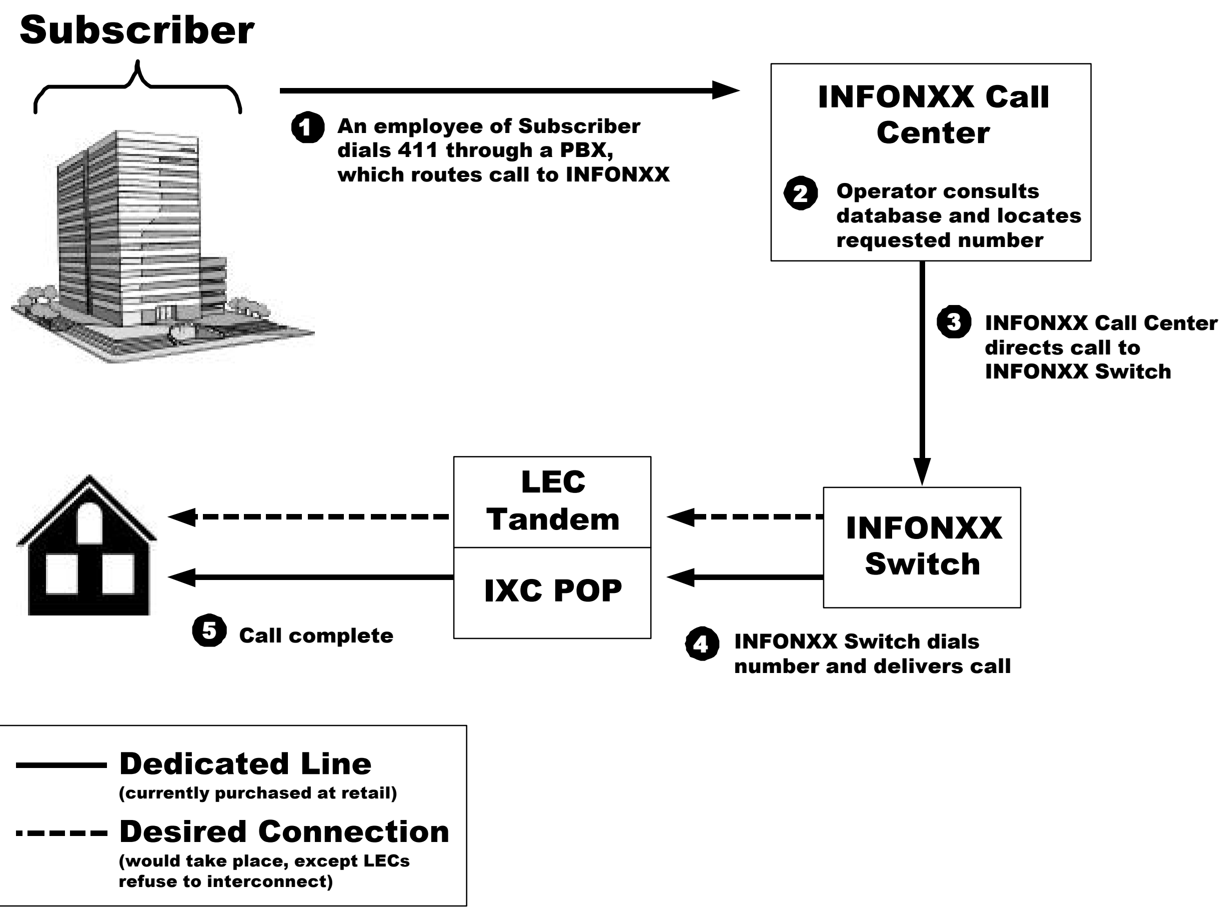
[16] *See CBT Comments*, at 11-12; *see also Bell Atlantic Comments*, at 5 (acknowledging that call completion could constitute telephone exchange or telephone toll service, depending on how it is provided).

[17] *CBT Comments*, at 12.

interconnect:



In this scenario, the DA provider contracts directly with a retail subscriber, such as a brokerage house, large bank, or law firm, and purchases a dedicated line to connect the PBX at the customer's location to INFONXX's call center. After the INFONXX operator has looked up the number, the number is transmitted to INFONXX's switch, which dials the number and delivers it to an IXC point-of-presence and through to the called party. Currently, local calls are not connected directly to the local exchange carrier (LEC) tandem because the LECs have refused to permit the DA providers to interconnect. However, if the Commission decides that DA providers are entitled to interconnect under Section 251, INFONXX will interconnect with LEC facilities and purchase the necessary unbundled loops and network elements to deliver calls directly to called parties. Where a DA provider obtains network facilities at wholesale and resells them directly to a customer as part of a service that includes call origination, switched delivery and call termination, it is clear that the DA provider is a provider of telephone exchange and/or telephone toll service entitled to the protections of Section 251. Of course, such a telephone service provider also is subject to certain regulatory requirements, with which INFONXX is willing to comply if it also receives the benefits of carrier status.[18]

C. Competitive Directory Assistance Providers Should Also Be Granted Access To Directory Listing Information Under Sections 201 and 202 of the Act.

As INFONXX and several other DA providers explained in their opening comments, the Commission has the authority, pursuant to Sections 201(b) and 202(a), to grant competitive DA providers access to directory listing information in accordance with the terms of Section 251(b)(3) in order to prevent unjust and unreasonable discrimination in LECs' charges and practices in connection with the provision of directory assistance information. The objections to this theory are twofold.

First, some commenters argue that the Commission has no authority to expand the reach of Section 251(b)(3) because Section 251 itself defines the scope of those to whom it can apply.[19] This argument must be rejected. It ignores the precedent established by the Commission's decision in the *Local Competition Second Report and Order* to rely on Sections 201(b) and 202(a) to extend the reach of Section 251(b)(3) to paging carriers seeking access to

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[18] Because the Commission has not previously addressed this matter, and because some aspects of the network topology described above are not now available, the Commission should apply any interpretation prospectively only.

[19] *See Bell Atlantic Comments*, at 8; *CBT Comments*, at 13; *GTE Comments*, at 9-10.

numbering resources.[20] Moreover, this argument would essentially read the broad grants of authority in Sections 201(b) and 202(a) out of the Communications Act by precluding the Commission from exercising the authority to find that a charge or practice made "in connection with" "like communication service" or any interstate communication is unjust, unreasonable or unjustly or unreasonably discriminatory whenever some aspect of the charge or practice is addressed elsewhere in the Act. Yet one of the clearest lessons from the Supreme Court's holding in *AT&T Corp. v. Iowa Utilities Board* is that Section 251 is simply another stitch in the fabric of the Communications Act of 1934, as amended, and that the Commission (and the courts) are obligated to interpret all sections of the Act in a coherent fashion. Recently adopted provisions should not be interpreted in isolation.[21] Thus, the Supreme Court has held that the Commission's statutory authority under Sections 201-202 is not so restricted as some commenters suggest.[22]

Second, some commenters contend that Sections 201(b) and 202(a) are not applicable because directory assistance and/or the provision of DA information are not interstate communications services subject to the Commission's jurisdiction.[23] This argument also lacks merit. The charges or practices subject to Sections 201(b) and 202(a) need not be directly related to an interstate communications service; they need only be "in connection with" interstate wire

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[20] *See INFONXX Comments*, at 22-23.

[21] *See AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721, 730 (1999) ("We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996.").

[22] *See Iowa Utilities Bd., id.*; *see also Ambassador, Inc. v. United States*, 325 U.S. 317, 323 (1945) (confirming breadth of Commission's power under Sections 201-202).

[23] *See Bell Atlantic Comments*, at 7-8; *CBT Comments*, at 12-13; *U S WEST Comments*, at 6.

service or “in connection with” “like communication service” that should not be subject to discriminatory treatment. As explained in INFONXX’s opening comments, DA service is directly related to utilization of the basic telephone network, at both the intrastate and interstate levels, and has been determined to be an "adjunct-to-basic" service.[24] Charges or practices affecting the provision of DA service are made “in connection with” the service, and may be unjust or unreasonable or unjustly or unreasonably discriminatory where they are designed to favor the monopoly carrier and disfavor competitors in the market for communications services.

III. ACCESS TO DIRECTORY LISTING INFORMATION AT INCREMENTAL PRICES IS CRITICAL TO PROMOTING COMPETITIVE PROVISION OF DA.

Regardless of the statutory provisions on which the Commission rests the decision to grant independent DA providers access to directory listing information, it is essential that independent DA providers be treated in a nondiscriminatory manner to their competitors, including LECs, IXCs, and other carriers. With respect to pricing, this means that independent DA providers must have access to DA databases at the forward-looking, incremental cost-based prices paid by IXCs and other carriers that obtain access to the databases under Section 251(c)(3).[25]

The comments reflect some confusion with respect to the question of pricing of directory listing information provided to independent DA providers: some comments suggest the

[24] *See INFONXX Comments,* at 11 n.13 (citing First Report and Order and Further Notice of Proposed Rulemaking, *The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket No. 92-105, 12 FCC Rcd 5572, 5600 n.170 (1997)).

[25] According to the *UNE Decision*, although DA services are no longer available as an UNE under Section 251(c)(3), directory assistance *databases* still are available at UNE pricing.

price that LECs impute to themselves or charge themselves,[26] others propose prices based on incremental or actual costs,[27] while others are silent on the issue. In interpreting the 1996 Act's nondiscrimination mandate,[28] however, sound competition policy provides a simple, overriding guide to the Commission: to enable companies to compete on the basis of superior products, not on artificial regulatory advantages. With respect to the incumbent LECs' dominant position in the local market, the Commission has recognized that a total element long-term incremental cost pricing model ensures that competitors can gain access to necessary inputs without paying monopoly profits that will give the incumbents an artificial and unfair advantage. Similarly, if major CLECs and ILECs are allowed more favorable terms of access, they will be artificially and unfairly advantaged.[29]

The present competitive landscape places independent DA providers at a considerable disadvantage to their competitors and thus requires immediate regulatory intervention. Over the last several years, independent DA providers have employed innovative methods – such as guaranteed service quality, call completion services, and national directory assistance – to compensate for the inflated costs of gaining access to directory listing

[26] *Bell Atlantic Comments*, at 6; *MCIW Comments*, at 7-8; *TWTC Comments*, at 6 ("non-carriers and carriers [should] pay the same price as LECs impute to their own DA service for access to the DA database").

[27] *See, e.g.*, *MCIW Comments*, at 8-9; *Metro One Comments*, at 11-12; *Teltrust Comments*, at 14.

[28] *See* 47 U.S.C. § 202(a); *id.* § 222(e); *id.* § 251(b)(3).

[29] Second Order on Reconsideration, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-227, ¶ 125 (released Sept. 9, 1999) (*Local Competition Second Reconsideration Order*) (nondiscriminatory means that an incumbent "does not discriminate between or among requesting carriers in rates, terms, and conditions of access"); *see also Local Competition Second Report and Order*, 11 FCC Rcd at 19444 (discussing the technical issue of "nondiscriminatory access," which is defined in qualitative terms as the same level of technical quality that a carrier provides to itself).

information. Recently, however, ILECs have made strides to match independent DA providers in the marketplace, all the while fervently resisting pro-competitive initiatives that would require them to provide non-discriminatory access to the bottleneck directory listing information that they currently are making available to AT&T and MCIW under Section 251(c).[30]

In short, the Commission should focus on the competitive bottom line in devising the terms of access to directory listing information, whether under Section 251, 201/202, or 222. Only by ensuring that alternative providers to AT&T and MCIW can compete with the ILECs in the DA market can the Commission facilitate the type of full-scale competition that it envisioned in its *UNE Decision* and that will benefit consumers. Particularly in a world where the ILECs need not make available their DA services as an unbundled element, the ability of independent DA providers to compete in the marketplace on a level playing field with the major CLECs and the ILECs is crucial. As explained in an earlier filing, the ILECs – and the major IXCs – currently enjoy as much as a 50% price advantage by gaining access to directory listing information at incremental cost.[31] In addition, more expensive access to the most reliable data also forces independent providers to rely on less accurate sources, leading to 40 million wrong

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[30] Carrier competitors, such as AT&T and MCIW, already have interconnection agreements that set rates pursuant to Section 251(c)(3). *See, e.g.*, *Ex Parte Notice* of INFONXX, Inc., CC Docket No. 96-115 (June 28, 1999); *Ex Parte* filing of INFONXX, Inc., CC Docket No. 96-115 (May 19, 1999); *Ex Parte* filing of INFONXX, Inc., CC Docket No. 96-115 (April 30, 1999); *Ex Parte* filing of INFONXX, Inc., CC Docket No. 96-115 (April 22, 1999); *Ex Parte* filing of INFONXX, Inc., CC Docket No. 96-115 (Mar. 18, 1999); *Ex Parte Presentation* of INFONXX, Inc., CC Docket No. 96-115 (Feb. 18, 1999). To save repetition of the points made in these filings, we incorporate them here by reference.

[31] This price advantage stems from the fact that the ILECs' (and major CLECs') discriminatory data access enables them to handle calls quicker (in that they are able to rely on a single, fully accurate, and up-to-date data source) and to avoid the expensive data costs that companies like INFONXX are forced to pay, often amounting up to $.25/electronic White Pages query. In

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numbers a year. Without incremental cost based pricing and nondiscriminatory access to directory listing information, consumers will not enjoy the benefits of competition in this important segment of the telecommunications market.[32] The Commission can solve these problems by mandating directory listing information access at incremental rates.

CONCLUSION

In accordance with the foregoing, INFONXX urges the Commission swiftly to adopt the necessary rules to ensure that competitive directory assistance providers have access to LECs' directory information at nondiscriminatory prices.

Respectfully submitted,

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(continued . . .)
Texas, major CLECs securing directory listing information under Section 251 are charged $.0011/item.

[32] For example, long distance directory assistance prices charged by AT&T and MCIW have risen from $.55 to $1.40 per call in this concentrated market. INFONXX by contrast, provides this service at $.45 per call.